Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

CHRIS FRAGOZO and MARIA SANCHEZ,

Cross-Petitioners,

v.

ALFRED CASTELLANO,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the requirement of a cross-appeal in order for the Court of Appeals to modify a judgment enlarging an appellee's rights thereunder, or diminishing the rights of appellee's adversary is a rule governing the power or jurisdiction of the Court of Appeals or is a rule of practice as to which exceptions can be made on a case-by-case basis?

2. Whether the Court of Appeals exceeded its power or jurisdiction by *sua sponte* creating a new 42 U.S.C. § 1983 due process claim to replace the 42 U.S.C. § 1983 malicious prosecution claim rejected by the Court of Appeals and remanding this case for a new trial on this new claim?

3. Whether the Court of Appeals exceeded its power or jurisdiction by ordering an open-ended remand for retrial of Cross-Respondent's state malicious prosecution claims and Fourteenth Amendment claims since they were dismissed prior to trial and Cross-Respondent did not cross-appeal their dismissal?

PARTIES TO THE PROCEEDINGS

Cross-Petitioners Chris Fragozo and Maria Sanchez were Defendants-Appellants in the Fifth Circuit below, and Defendants in the District Court. Cross-Respondent Alfred Castellano was the Plaintiff-Appellee in the Fifth Circuit below, and Plaintiff in the District Court. Bexar County, Texas; the Bexar County District Attorney's Office, and its prosecutor, Edward Sargologos; the City of San Antonio, Texas, and, Alfred Castro as an arson investigator for the City's fire department, were defendants in the trial court but were not parties in the appellate proceedings below.

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OPINIONS BELOW

The Fifth Circuit Court of Appeal's *en banc* decision is published at *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). (Pet. App. 2a)[1]. No party sought rehearing of the Fifth Circuit's *en banc* decision. The Fifth Circuit's opinion granting Cross-Petitioners' Petition for Rehearing En Banc is published at *Castellano v. Fragozo*, 321 F.3d 1203 (5th Cir. 2003) (Pet. App. 73a). The Fifth Circuit panel decision is published at *Castellano v. Fragozo*, 311 F.3d 689 (5th Cir. 2002). (Pet. App. 75a). The District Court's Order of Judgment is unpublished. (Pet. App. 165a).

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit issued its *en banc* decision on December 5, 2003. Petitioner Alfred Castellano filed his Petition for Writ of Certiorari which was docketed in this Court on March 10, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Supreme Court Rules. Cross-Petitioners expressly rely upon Rule 12.5 as a basis for jurisdiction of this Cross-Petition and is conditional upon this Court's grant of Petitioner's Petition for Writ of Certiorari.

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1. As authorized by Supreme Court Rule 12.5, Cross-Petitioners have not reproduced herein the materials already produced in Petitioner's Petition in Appendix A through E, numbered 1a -175a. This material is referred to as "Pet. App." herein.

CONSTITUTIONAL AMENDMENTS & STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Fourteenth Amendment Due Process Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Section I of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding or redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

Rule 4(a)(3), Federal Rules of Appellate Procedure provides:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days time after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule (a), whichever period last expires.

STATEMENT OF THE CASE

This case arises from entangled lives of Alfred Castellano, Maria Sanchez, and Chris Fragozo. At the time of the events that led to this litigation, Castellano operated a chain of fast food restaurants in the City of San Antonio called Fred's Fish Fry. Sanchez was a trusted employee of the business and Fragozo was a City of San Antonio police officer working security part time for the business. Also, Castellano held a citizen's position on the San Antonio Fire and Police Civil Service Commission, hearing appeals of police personnel from decisions of the Chief of Police.

On October 31, 1984 one of his restaurants burned. Shortly after the investigation of the fire began, Officer Castro, a fire department arson investigator, determined the fire had been intentionally set and was an "inside job." The fact the fire was arson has never been disputed. The investigation led to Castellano, partly as a result of tape recordings of conversations with Castellano by Maria Sanchez produced with a recorder purchased personally by Fragozo and supplied to her.

Castro and his partner prepared and signed affidavits and presented the case to the Bexar County District Attorney. Castro presented the affidavit to a magistrate judge, a warrant was issued and Castellano was arrested. He was released within a few hours after being booked. An examining trial was conducted and probable cause was found. Castellano was indicted, tried and convicted of arson, and sentenced to five years probation.

Castellano denied guilt, stating that Sanchez and Fragozo conspired to implicate him in the arson; Sanchez because he fired her after she refused to comply with company policy requiring her to take a polygraph after some money was missing; that she and Fragozo were lovers; and Fragozo had because Castellano refused to give Fragozo a copy of a police examination that Fragozo had to pass for promotion. Sanchez contends that Castellano solicited her help in the arson of the financially faltering store, and she taped conversations with him to prevent him from trying to implicate her in the arson if he did burn the restaurant.

In 1993, on his third habeas attempt, the Texas Court of Criminal Appeals set aside his conviction and remanded the case to the trial court. The District Attorney dismissed the case for lack of sufficient evidence. No witnesses were called by the State to testify at the habeas hearing which ultimately led to the reversal and dismissal of the Castellano's criminal conviction for arson.

Following the dismissal of charges, Castellano filed suit in the District Court of the 288th Judicial District, Bexar County, Texas, against Sanchez, Fragozo and Castro, in both their individual and official capacities, the City of San Antonio, the Bexar County District Attorney's Office, and its prosecutor, Edward Sargologos. Castellano's original petition against these parties was a common law suit for malicious prosecution. He later amended his petition to allege a § 1983 suit in addition to malicious prosecution, claiming that the defendants were guilty of malicious prosecution and had denied him rights secured by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

After Castellano filed his amended petition seeking relief under § 1983, the defendants removed the case to federal court, and shortly after removal, all defendants except Castro, Sanchez, Fragozo and the City of San Antonio were dismissed by the U.S. District Court. The District Court also consolidated the common law malicious prosecution claim with the claims brought pursuant to § 1983 ruling that the case would proceed on that sole theory of recovery. Castellano filed a motion for reconsideration of this ruling which was never acted upon by the District Court. Castellano did not cross-appeal the District Court's ruling in the Fifth Circuit. The case was then referred to the magistrate judge for trial. The magistrate judge granted defendants' motion for partial summary judgment and dismissed Castellano's claims other than his Fourth and First Amendment claims. Castellano subsequently abandoned any First Amendment claim. Castellano did not cross-appeal the magistrate court's summary judgment rulings in the Fifth Circuit either.

A seven-person jury returned a verdict awarding $3,000,000 in compensatory damages and $500,000 in punitive damages against Sanchez and Fragozo, and exonerated Castro. A directed verdict was granted for the City at the close of evidence. A divided panel of the Fifth Circuit Court of Appeals upheld the judgment entered on the verdict, and *en banc* review by that court was granted.

On rehearing, *en banc*, the Fifth Circuit held that "malicious prosecution" standing alone is no violation of the United States Constitution, and to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law. (Pet. App. 2). The Fifth Circuit, reversed the judgment and remanded the case for a new trial of Castellano's federal and state claims under the Fourth and Fourteenth Amendments and any state claims he may have. (Pet. App. 44a).

REASONS FOR GRANTING THE CROSS-PETITION

Rule 10 of the Supreme Court Rules provides two considerations for granting this cross-petition applicable to this case: (1) a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;" (2) the court of appeal's opinion "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers."

In support of this cross-petition for writ of certiorari and the granting of review of this case by the Supreme Court, cross-petitioners contend that the Fifth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers . . ." by *sua sponte* ordering a remand and "open-ended" retrial on a newly created § 1983 due process claim as well as several others despite the fact that the Cross-Respondent never requested for this relief. (App. 48-49a). The Fifth Circuit's majority *en banc* ruling in this case has "turned the trial and appeal process on its head." (App. 49a). This case also provides the opportunity for this Court to review the actions of the Fifth Circuit Court of Appeals through the prism of the long-standing rule that it is necessary to cross-appeal in order to attack a decree with a view toward enlarging his own rights or lessening the rights of his adversary, with the view of determining the open-question, the answer of which has been split among the circuits, whether this rule is jurisdictional and not subject to exception or simply a rule of practice.

1. Review of this case should be granted to determine whether the Fifth Circuit exceeded its jurisdiction in this case by, *sua sponte*, ordering a remand and retrial on its newly created § 1983 due process claim and other claims in the absence of a cross-appeal, and departed from the accepted and usual course of judicial proceedings, thus calling for an exercise of this Court's supervisory powers.

The Fifth Circuit's majority opinion, while noting that Castellano's Fourteenth Amendment claims were dismissed before trial and that Castellano did not cross-appeal, ruled with little explanation that no-cross appeal was necessary. (Pet. App. 42a-43a). It likewise ruled that Castellano could replead his state claims despite his failure to cross-appeal the trial court's ruling merging his state malicious prosecution claim into his § 1983 claim. (Pet. App. 43a-44a).

The Fifth Circuit's remand order prompted several dissenting opinions. In the first, Circuit Judge E. Grady Jolly joined Circuit Judges Jones and Barksdale in rejecting a remand on state claims and a due process claim. (Pet. App. 44a-45a). Circuit Judge Edith H. Jones, joined by Circuit Judges Smith, Clement and Prado, questioned the majority's "broad remand order" which purports to allow Castellano to retry state law claims notwithstanding Castellano did not appeal from the magistrate judge order consolidating his state law malicious prosecution claim into a § 1983 claim. (Pet. App. 45a). Responding to the majority's order, Judge Jones states in her dissent that the "majority opinion continues a troublesome trend in this court's recent en banc decisions deviating from normal standards of appellate practice." (Pet. App. 46a).

In another dissent, Circuit Judge Barksdale, joined by Circuit Judges Emilio M. Garza, concurred with the majority holding that malicious prosecution may not be pursued through § 1983. However, he notes:

> This was the sole reason for en banc review. Most regrettably, new, unbriefed issues have been used to diminish, if not swallow, this new holding. Again, the majority has confected, *sua sponte*, a new § 1983 due process claim to replace the now torpedoed § 1983 malicious prosecution claim. Again, to have matters even worse, it remands, *sua sponte*, for an open-ended new trial on this and other issues.
>
> Accordingly, I must respectfully dissent in part. The majority erred in establishing this new § 1983 claim. And, again, in order to establish it and to remand for the new trial on it and other claims, the majority turned its back on long-standing rules of appellate procedure. There is no justification for creating this new § 1983 claim and remanding to allow Castellano yet another round of litigation, despite his repeated failures at trial and on appeal to raise the very issues the majority now allows him belatedly to try on remand. We are not a court of original error; yet this is the role played by the majority. It has turned the trial and appeal process on its head.

(Pet. App. 49a).

> Judge Barksdale further wrote that when the District court dismissed Castellano's Fourteenth Amendment claims along with his Fifth, Sixth and Amendment claims, he did not raise by cross-appeal the dismissal of any of these claims. (Pet. App. 52a-53a). Additionally, he pointed out that while the District court erred in placing Castellano's state law claim under § 1983; Castellano identified the error and objected; but, never presented this issue on appeal either. (Pet. App. 69a).

He reasoned further that:

> In general, even without filing a cross-appeal, an appellee can still present an issue on appeal that does not seek to modify the judgment; in other words, he must cross-appeal only when he seeks to alter it. *E.g. Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996). But, obviously, even if a cross-appeal is not required to present an issue, the appellee must still present it on appeal if he wants it considered. *E.g.*, *United States v. Hill*, 42 F.3d 914, 917 n.8 (5th Cir.), *cert denied*, 516 U.S. 843, 133 L. Ed. 2d 79 (1995).

Castellano did neither.

Judge Barkdale concludes his dissent with this telling summary:

> Sympathy for a litigant does not permit us to entertain claims not presented on appeal – most especially, those of constitutional dimension. It most certainly does not allow us to create, *sua sponte*, a new remedy for that litigant and an erroneous remedy at that. At Castellano's election, only the now proscribed § 1983 malicious prosecution claim was at issue before our court; the following claims were not: (1) Fourteenth Amendment due process; (2) Fourth Amendment; (3) state malicious prosecution; and (4) any other state claim Castellano can dream up on remand. In addition to the new § 1983 due process claim's being violative of Parratt[2], any relief the majority accords Castellano on these issues greatley exceeds the scope of this appeal and is violative of long established appellate rules to which we require parties to adhere – day in and day out – at their prejudice.
>
> Accordingly, although I fully concur in our finally proscribing a claim under § 1983 for malicious prosecution, I must respectfully dissent from both the creation of the new § 1983 due process remedy and the remand of this action for yet another round of litigation. Instead, I would vacate and render for appellants. This is not an unfair result – far from it. It is the result for which Castellano, by his election on appeal, rolled the dice . . . and lost.

(Pet. App. 70a-71a).

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2. *Parratt v. Taylor*, 451 U.S. 527 (1981).

2. Review of this case should be granted on this Cross-Petition to harmonize the conflict among the United States courts of appeal and bring them in line with this Court's longstanding jurisprudence holding that the cross-appeal requirement is jurisdictional.

This case invokes this Court's long-standing ruling that

> absent a cross appeal, an appellee may 'urge in support of a decree any matter in the record, although his argument may invoke an attack upon the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'

United States v. American Railway Express Co., 265 U.S. 425, 435, 44 S. Ct. 560, 68 L. Ed. 2d 1087 (1924). This Court has held that this rule is "inveterate and certain." *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 328, 81 L. Ed. 2d 593 (1937). This inquiry, likewise, involves a construction of Rule 4(a)(3), Fed. R. App. Proc.

Time and again, this Court has held that the filing of a timely notice of appeal is "mandatory and jurisdictional." *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316, 108 S. Ct. 2405, 2409, 101 L. Ed. 2d 285 (1988) ("... a court of appeals ... may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause' under Rule 2"); *Budinich v. Becton Dickinson And Co.*, 486 U.S. 196, 201, 108 S. Ct. 1717, 1722, 100 L. Ed. 2d 178 (1988) ("the taking of an appeal within the prescribed time is mandatory and jurisdictional"); *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 59, 103 S. Ct. 400, 403, 74 L. Ed. 2d 225 (1982) ("It is settled that the requirement of a timely notice of appeal is mandatory and jurisdictional"). More recently, this Court stated that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 477, 480, 119 S. Ct. 1430, 1435, 143 L. Ed. 2d 635 (1999).

A. The courts of appeals are in conflict with this Court's "inveterate and certain" rule, some holding that the requirement of a cross-petition is jurisdictional while others consider it merely a rule of practice subject to exception.

Some circuits have considered the cross-appeal requirement to be a rule of practice and not jurisdictional while others have considered this rule to be jurisdictional. At times, even within circuits, the rule has not been consistent. A representative sampling of cases that consider the cross-appeal requirement to be jurisdictional: *See, e.g., Johnson v. Teamsters Local 559*, 102 F.2d 21, 29 (1st Cir. 1996); *E.F. Operating Corp. v. American Bldgs*, 993 F.2d 1046, 1049 n.1 (3d Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 193, 126 L. Ed. 2d 151 (1993); *Francis v. Clark Equipment Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993); *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 1206 (3d 1991); *Rollins v. Metropolitan Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir. 1990); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-17 (7th Cir. 1989); *Savage v. Cache Valley Dairy Assn.*, 737 F.2d 887, 888-89 (10th Cir. 1984); *Securities and Exchange Commission v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir. 1979); *Zapico v. Bucyrus-Erie Co.*, 579 714, 725-26 (2d Cir. 1978).

Cases that consider the cross-appeal requirement to be a rule of practice and not jurisdictional: *See, e.g., Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993); *Lee v. Burlington Northern Santa Fe Ry. Co.*, 245 F.3d 1102 (9th Cir. 2001); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32-3 (D.C. Cir. 1990), *cert denied*, 498 U.S. 980, 981, 111 S. Ct. 508, 509, 112 L. Ed. 2d 521 (1990); *LaFaut v. Smith*, 834 F.2d 389, 394 n.9 (4th Cir. 1987); *Freeman v. B&B Associates*, 790 F.2d 145, 151 (D.C. Cir. 1986) (failure to file notice of cross-appeal is not jurisdictional, and can be waived "but only in cases involving exceptional circumstances"); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-42 (9th Cir. 1981).

Even within circuits, the rule has not been consistent. For example, The Eight Circuit has treated the cross-appeal rule as non-jurisdictional. *See Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476-77 (8th Cir. 1977) It has, however, used language suggesting the opposite conclusion. *Cf. Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985).

B. The Fifth Circuit has not been consistent in the application of this rule.

The Fifth Circuit has generally considered that a notice of cross-appeal is jurisdictional. *See Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996) ("Because Kelly did not file a notice of appeal or cross-appeal, however, we lack jurisdiction to alter the district court's judgment in her favor," citing *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364, 114 S. Ct. 855, 862, 127 L. Ed. 2d 183 (1994); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 239 n.2 (5th Cir. 1990)) (declining to consider appellee's request for relief because they did not cross-appeal and

"we have held that 'the filing of a notice of appeal is a "mandatory precondition" to our exercise of jurisdiction.'"); *Shipp v. General Motors Corp.*, 750 F.2d 418, 428 (5th Cir. 1985) (filing a notice of appeal is a "mandatory precondition" to our exercise of jurisdiction). There are, however, older Fifth Circuit cases which have treated the cross-appeal requirement as a rule of practice subject to exception in rare cases. *See, e.g., United States v. Unites States Steel Corporation*, 520 F.2d 1043, 1052 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S. Ct. 61, 50 L. Ed. 2d 77 (1976); *United States v. Gordon*, 406 F.2d 332, 337-38 n.6 (5th Cir. 1969); *Calhoun County v. Roberts*, 137 F.2d 130, 132 (5th Cir. 1943). However, it has recognized a limited exception when applied to the review of dismissals involving Prison Litigation Reform Act cases. *See Mart v. Hines*, 117 F.3d 1504 (5th Cir. 1997).

In the event this Court grants Petitioner's Petition For Writ of Certiorari, this Court should, likewise, grant this cross-petition for writ of certiorari to determine not only whether the Fifth Circuit Court of Appeals exceeded its jurisdiction by it broad remand order, *sua sponte* ordering a remand on claims for which there was no cross-appeal, but to decide once and for all whether the cross-appeal requirement is in fact jurisdictional, or a rule of practice, an approach subscribed to by several courts of appeals in their decisions. This case affords this Court the opportunity lacking in its recent *El Paso Natural Gas*, *supra*, decision. The, *sua sponte*, action of the Fifth Circuit Court of Appeals in ordering a remand and retrial of this case on claims not preserved by cross-appeal, or ever raised by Cross-Respondent on appeal, clearly places this important question, and the proper construction of Rule 4(a)(3), Fed. R. App. Proc., in the context of this case, directly in issue before this Court to decide.

CONCLUSION

In the event that the Court grants the Petitioner's Petition, Cross-Petitioners submit that, to accord fairness and complete justice in this case, the Court should also grant this Conditional Cross-Petition.

Respectfully submitted,

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In the Supreme Court of the United States

CHRIS FRAGOZO, and MARIA SANCHEZ
Cross-Petitioners,

v.

ALFRED CASTELLANO,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI:

Review should be denied because the Court of Appeals correctly remanded all claims. Castellano was not required to cross-appeal because he was not seeking to expand his rights under the judgment or alter it. (Pet. App 42-43a). Whether a cross-appeal was jurisdictional or a rule of practice has not been shown to be an issue here because Castellano fell within the exception articulated in *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924). Finally, remand was appropriate here under the unique circumstances of this case because the Court of Appeals "changed the rules of the game." (Pet.App. 46a).

1. Review should be denied because the Court of Appeals did not exceed its jurisdiction or depart from the accepted and usual course of judicial proceedings by remanding on all claims where it did not *sua sponte* create any new constitutional claims and Castellano was not required to cross-appeal.

The Court of Appeals possessed jurisdiction to remand all claims.[1] The Court of Appeals did not create any new causes of action. As far as the Fourteenth Amendment claim, the Court of Appeals acknowledged that the Cross-Petitioner's "manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction

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[1] The Court of Appeals split 12-3 to remand on the Fourteenth Amendment claim. The Court split 9-6 to remand the Fourth Amendment claims. The Court split 8-7 to remand on the state law claim.

deprives a defendant of his *long recognized* right to a fair trial secured by the Due Process Clause." (Pet.App.3a) [emphasis added].

The Court of Appeals remanded the Fourteenth Amendment claim after concluding that on appeal Castellano sufficiently urged affirmation of the judgment on the basis that the jury effectively decided the Fourteenth Amendment claim because the jury was charged on due process despite the earlier dismissal by the trial court. (Pet.App. 3a, 8a and 41-43a). In short, Castellano was not seeking to expand his rights or alter the judgment but rather affirm it, and thus, no cross appeal is required. *American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924). As stated by the Court of Appeals:

> "[I]t is settled that an appellee may urge any ground available in support of a judgment even if that ground was earlier and erroneously rejected by the trial court.

(Pet.App. 43a). *See, United States v. Hill*, 42 F.3d 914, 917, n.8 (5th Cir. 1995); *Hoyt R. Matise Co. v. Zurn*, 754 F.3d 560, 565 n. 5 (5th Cir. 1985); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 n. 4 (5th Cir. 1976).

As for the Fourth Amendment claim, the Court of Appeals, albeit erroneously, reversed the judgment because it concluded that it "must return to the basics" and insisted that Castellano's Fourth Amendment claim for wrongful conviction rest upon a denial of rights secured by the Fourth Amendment, which are not coextensive with the common-law elements of malicious prosecution. (Pet.App. 2-3a and 44a). The Court of Appeals remanded the Fourth Amendment claim, however, because the judgment did not distinguish between pretrial and trial events. The Court of Appeals

reasoned that in lieu of its holding, any damages flowing from trial events would be unrecoverable under the newly circumscribed Fourth Amendment claim. (Pet.App. 3a and 41-43a). Again, Castellano was not required to cross-appeal to be entitled to retry his case with this new limitation on recoverable damages because he was not seeking to expand his rights under the judgment or to alter the verdict, but to affirm it. *American Railway Express Co.*, 265 U.S. at 435, 44 S.Ct. at 560, 68 L.Ed. at 1087.

The Court of Appeals correctly held that Castellano also may re-plead state law claims. (Pet.App. 43-44a). The Court of Appeals reasoned that Castellano had purposely abandoned his state law claims because until now the elements of a state law malicious prosecution claim and a Fourth Amendment claim under Section 1983 had been "coextensive." (Pet.App.44a). The Court of Appeals conceded that it had "pulled the legal rug from all parties," warranting remand. (Pet.App. 44a).

The Cross-Petitioners rely extensively on Justice Barksdale's dissent.[2] With due respect to Justice Barksdale's version of events at oral argument,[3] the Cross-Petitioners offer no legal authority permitting this Court to *de novo* substitute its findings as to whether Castellano urged affirmation on due process grounds at oral argument for that

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[2] Justice Barksdale's dissent is premised on his erroneous contention that Castellano did not sufficiently urge affirmation of the judgment based on the submission of the due process claim in the jury charge. Justice Barksdale's dissent is silent as to why the exception would not apply to the Fourth Amendment or state-law claims.

[3] (Pet.App. 53-54a).

of the *en banc* majority of the Court of Appeals. The Court of Appeals, as stated above, did not create any new claims. (Pet.App.3a).

Justice Barksdale also argues with little explanation that "fairness must be shown to both sides,"and in his view, "it is quite unfair to defendants, especially in light of what repeatedly took place at trial concerning the Fourth Amendment claim, to afford Castellano yet another opportunity to try such a claim." (Pet.App. 68a). In his weighing of "fairness," Justice Barksdale apparently gives little weight to the fact that (1) a jury concluded the Cross-Petitioners fabricated evidence, perjured themselves, and maliciously conspired to frame Castellano for a felony crime that he did not commit; (2) the Cross-Petitioners repeatedly failed to object to the jury charge at trial; and (3) the Court of Appeals reversed 20-plus years of legal precedent, in pulling the "legal rug" from Castellano.

Even Justice Jones in her dissent acknowledged the "fairness" of remand on the due process claims, conceding:

> "at every step of litigation, [Castellano] conscientiously attempted to conform to this court's decisions and to accomplish the ultimately impossible task of harmonizing our case law with the Supreme Court. Because this court changed the game technically on Castellano, he should be allowed to retry this claim as one for violation of procedural due process based on appellant's fabrication of evidence against him."

(Pet.App. 46a).[4]

2. Review should be denied because whether a cross appeal is a rule of practice or a jurisdictional requirement was not an issue before the Court of Appeals, but regardless under the unique circumstances of this case, remand was appropriate

The Cross-Petitioner incorrectly asserts that this case calls into question this Court's longstanding rule that:

> "Absent a cross appeal, an appellee may 'urge in support of a decree any matter in the record, although his arguments may invoke an attack on the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'"

American Railway Express Co., 265 U.S. at 435, 44 S.Ct. at 560, 68 L.Ed. at 1087. The Circuit Court concluded that Castellano "did not attempt to expand his rights under the judgment by urging that it can be sustained under the Fourteenth Amendment despite the ruling of the trial court." (Pet.App. 43a).[5] Simply put, Castellano fell within the

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[4] Justice Jones joined Justice Barksdale's dissent on remand of the Fourth Amendment claims without further explanation.

[5] Justice Higgenbotham, who authored the majority opinion in *Castellano,* is most certainly familiar with the application of the rule articulated in *American Railway Express* Co. *See, Marte v. Hines,* 117 F.3d 1504 (5th Cir. 1997) (J. Garwood dissenting).

exception of the rule articulated in *American Railway Express,* and no cross-appeal was required. *See also, Langes v. Green,* 282 U.S. 531, 41 S.Ct. 243, 75 L.Ed. 520 (1931). As such, whether a cross-appeal is a "rule of practice" or a jurisdictional requirement that can be waived has not been shown to be at issue here.

The Cross-Petitioners are correct that the courts of appeals split over whether a cross appeal is a rule of practice or a jurisdiction requirement that may be waived under some circumstances. The Fifth Circuit Court of Appeals addressed this split of authority in detail in *Marte v. Hines,* 117 F.3d 1504 (5th Cir. 1997) (J. Garwood dissenting) (citing case).[6] The Second, Fourth, Ninth, and District of Columbia Circuits have recognized that the cross-appeal is a rule of practice that can be dispensed with in certain circumstances. *See, Texport Oil Co. v. M/V Amolyntos,* 11 F.3d 361, 366 (2nd Cir. 1993); *LaFaut v. Smith,* 834 F.2d 389, 394 n. 9 (4th Cir. 1987); *Bryan v. Technical Research Company,* 654 F.2d 1337, 1341-42 (9th Cir. 1981); *Spann v. Colonial Village, Inc.,* 899 F.2d 24, 32-33 (D.C. Cir.), *cert. denied,* 498 U.S. 980, 981, 111

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[6] Interestingly, Justices Barksdale, Jones, and Jolly, who argued here in dissent that a cross appeal was jurisdictional for some or all of Castellano's claims joined the majority in *Marte*, which held that the appellate court has the authority to *sua sponte* change the district court's judgment from one dismissing the claims without prejudice to one dismissing with prejudice even though there was no cross-appeal. *Id.* at 1506. For the record, Justice Higgenbotham, who wrote the majority opinion in *Castellano* dissented in *Marte*, arguing that a cross appeal is jurisdictional where the appellate court seeks to modify the judgment in such a manner in favor of a defendant. *Id.* at 1506 (J. Garwood, dissenting) (leaving open the question of whether under some circumstances the cross appeal requirement is waivable).

S.Ct.508, 509, 112 L.Ed.2d 521 (1990).

The First, Sixth, Seventh, Tenth, and District of Columbia Circuits have concluded that the cross appeal requirement is jurisdictional. *See, Johnson v. Teamsters Local 559,* 102 F.2d 21, 29 (1st Cir. 1996); *Francis v. Clark Equipment Co.,* 993 F.2d 545, 552-553 (6th Cir. 1993); *Rollins v. Metropolitan Life Ins. Co.,* 912 F.2d 911, 917 (7th Cir. 1990); *Savage v. Cache Valley Dairy Ass'n,* 737 F.2d 887, 888-889 (10th Cir. 1984); *Gomez v. Wilson,* 477 F.2d 411, 414 n. 10 (D.C.Cir. 1973).

The Fifth Circuit itself is divided as to whether a cross appeal is a jurisdictional requirement or a rule of practice that can be waived under certain circumstances. The dissent in *Marte* provides an extensive list of Fifth Circuit opinions on both sides of the issue. 117 F.3d at 1508-09. The Third and Eighth also split among themselves as to whether the requirement is jurisdictional or a rule of practice. *See, E.F. Operating Corp. v. American Buildings,* 993 F.2d 1046, 1049 & n. 1 (3rd Cir.), *cert. denied,* 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed. 151 (1993) and *Benson v. Armontrout,* 767 F.2d 454, 455 (8th Cir. 1985) (cross appeal jurisdiction); *Compare, United States v. Tabor Court Realty Corp.,* 943 F.2d 335, 342-45 (3rd Cir. 1991) and *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977) (cross appeal non-jurisdictional).

Review should be denied because remand was appropriate under the "unique circumstances of this case" of this case and the significant disagreement among the various Courts of Appeals over whether a cross appeal is a rule of practice or

jurisdictional requirement that can be waived.[7] (Pet.App. 29-30a).

CONCLUSION

For the reason stated above, the Court should deny the Conditional Cross-Petition.

Respectfully Submitted,

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[7] The Court of Appeals applied the same reasoning to otherwise ignore the ordinary rules of appellate practice and apply an abuse of discretion standard rather than a plain error review to the jury charge despite the Cross-Petitioners' repeated failure to properly object at trial. (Pet.App. 29-30a).